

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

DANIEL E. VIGORITO, JR.,	:	CASE NO. 4:04-cr-0011
Petitioner,	:	
vs.	:	OPINION & ORDER
UNITED STATES OF AMERICA,	:	[Resolving Docs. No. 39, 42, 43.]
Respondent.	:	
	:	

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

With this Opinion and Order, the Court decides whether to adopt Magistrate Judge George J. Limbert's Report and Recommendation on Petitioner Daniel Vigorito Jr.'s motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. [Doc. 43.]

For the reasons presented below, the Court **ADOPTS** the Report and Recommendation of Magistrate Judge Limbert, **GRANTS** Petitioner's motion, and **REMANDS** the case for resentencing.

I. Background

On May 20, 2004, this Court sentenced Vigorito to a term of 151 months of imprisonment followed by three years of supervised release. [Docs. 27, 28.] After unsuccessfully appealing to the Sixth Circuit Court of Appeals and the United States Supreme Court, Petitioner Vigorito filed the instant motion with this Court on January 19, 2007. [Doc. 39.] On January 29, 2007, the Court

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referred the Petitioner's motion to Magistrate Judge George J. Limbert for a Report and Recommendation. [Doc. 40.] On February 16, 2007, Respondent filed a brief opposing the Petitioner's motion. [Doc. 42.]

After conducting a thorough analysis of the Petitioner's motion, on September 10, 2007, Magistrate Judge Limbert recommended that the Court grant Petitioner's motion and remand his case for resentencing. [Doc. 43.] The Magistrate Judge recommended that the Court find that "Petitioner's appellate counsel was not ineffective in failing to raise *Booker/Barnett* issues because he did eventually raise them in the Sixth Circuit pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure before Petitioner's appeal was denied." *Id.* However, the Magistrate Judge nevertheless recommended that the Court remand Vigorito's case for resentencing because "Petitioner's sentence was pending on direct appeal when *Booker* and *Barnett*, cases finding that the Sentencing Guidelines are advisory, were decided." *Id.* Thus, the Magistrate Judge recommends finding plain error with regard to Vigorito's sentence.

II. Legal Analysis

The Federal Magistrates Act requires a district court to conduct a *de novo* review only of those portions of the Report and Recommendation to which an objection has been made. *See* 28 U.S.C. § 636(b)(1). Parties must file any objections within ten days of the Report's issuance. *Id.* *see also* Doc. 43. They waive their right to appeal the Recommendation if they fail to object within the time allowed. *See, e.g., Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

In the instant case, on September 10, 2007, Magistrate Judge Limbert issued a Report and

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Recommendation. [Doc. 43.] More than ten days have passed, and neither party has objected to his Recommendation. Having conducted its own review of the parties' briefs on the issue, the Court agrees with the conclusions of Magistrate Judge Limbert and adopts the Report and Recommendation as its own. Therefore, the Court incorporates Magistrate Judge Limbert's findings of fact and conclusions of law fully herein by reference.

III. Conclusion

For the reasons discussed above, the Court **ADOPTS** the Report and Recommendation of Magistrate Judge Limbert, **GRANTS** Petitioner's motion, and **REMANDS** the case for resentencing.

IT IS SO ORDERED.

Dated: October 1, 2007

s/ James S. Gwin
JAMES S. GWIN
UNITED STATES DISTRICT JUDGE